IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 363 of 1997

in

SPECIAL CIVIL APPLICATION No 9893 of 1996

with

Civil Application No. 3685 of 1997

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TALUKA DEVELOPMENT OFFICER

Versus

RAMESHCHANDRA M BHATT

Appearance:

1. LETTERS PATENT APPEAL No. 363 of 1997

MR HS MUNSHAW for Appellants

MR JD AJMERA for Respondent No. 1

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 03/07/2003

C A V JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. Instant appeal which is filed under Clause 15 of the Letters Patent, is directed against judgment dated March 21, 1997 rendered by the learned Single Judge in Special Civil Application No. 9893 of 1996 by which award dated July 1, 1996 rendered by the Industrial Tribunal, Rajkot in Reference (ITR) No. 67 of 1991 directing the appellant No.1 to make his workman, Rameshchandra M. Bhatt, the respondent herein, permanent with effect from 1/12/1978 and to treat the period from 1/12/1978 to 31.12.1994 as notional and pay him the arrears with effect from 1.1.1995 onwards and also to pay Rs.500/- to the Union of the respondent towards cost, is upheld and thereby the petition filed by the appellants is dismissed.

2. The respondent was appointed by the appellant No.1 vide order dated November 20, 1975 as a workman on temporary adhoc daily wager on a daily remuneration of Rs.7/- which was paid out of 2% contingency fund. The respondent was required to work as a clerk on the construction projects and the works undertaken by the Taluka Panchayat. He had to work in the projects which were sanctioned and finalised either by the District Panchayat or the State Government. The respondent was required to work as and when work was available. However, the respondent was continued as a clerk from time to time as one or the other project was on hand of the Taluka Panchayat and contingency funds were available since the grants were sanctioned either by the State Government or the Taluka Panchayat.

3. It was the case of the respondent that he had continuously worked for the last 15 years before raising dispute. According to him, though he was working on a permanent post he was not made permanent and not given the wages and other benefits as available to other permanent employees which was against the principles of natural justice. The respondent, therefore, approached the Surendranagar Jilla Mazdoor Sangh for raising dispute and the Surendranagar Jilla Mazdoor Sangh filed statement of claim advancing the cause of the respondent before the Deputy Commissioner of Labour, Rajkot. On failure of conciliation proceedings, the Deputy Commissioner of

Rajkot vide his letter No. KH/SWWC/479 P.P./IDR/AJ/J.V.A.C./478/90 dated 28.2.1991 referred the dispute to the Tribunal for adjudication. The dispute referred to the Tribunal was as under:

> "Whether Shri Rameshchandra M. Bhatt would be made permanent as Clerk from the date of appointment and should be paid back arrears as available to the permanent employees"?

5. The reference was contested by the appellant No.1 by filing written statement Ex.9 wherein it was inter alia denied that the respondent was working since 15 years under the Panchayat. It was asserted that the respondent was appointed vide order dated 20.11.1975 for different construction project works and that he was initially appointed as a temporary adhoc daily wager when he was of 38 years of age. It was also claimed that there was no such post in the set up and, therefore, question of making him permanent would never arise. It was also stated that the wages were paid from the contingency fund of the project works and his presence was marked in the muster roll. It was contended that the Taluka Panchayat had no power to create permanent post nor was there any fund for the same and the work was not permanent in nature. It was also stated that the respondent had not completed 240 days of service in any year and, therefore, it was urged to dismiss the reference.

6. The Industrial Tribunal, Rajkot, recorded the evidence of the respondent at Ex.19, wherein, he had stated the same facts which he had stated in his application. On behalf of the Taluka Development Officer, Rasiklal Jethalal Nayak, was examined at Ex.21 wherein it was reiterated that the age limit for recruitment to the post of Clerk is 23 years and the regular recruitment was to be made through the Gujarat Panchayat Service Selection Committee. It was clarified by him that for the appointment of the respondent, as a clark, no such procedure was followed. It was also stated that the respondent was appointed only for the construction project works.

7. On appreciation, evaluation and analysis of the oral evidence and the documents produced and relied upon by the parties, the Tribunal held that the respondent was continuously working on daily wage basis right from 20.11.1975 and had completed 20 years of service as daily-rated workman. It was also held that though the respondent was working as typist cum clerk he was not

paid the salary and other allowances as other regularly appointed typist cum clerks were paid. Resultantly the Tribunal passed the award in favour of the respondent to which reference is made earlier.

8. Feeling aggrieved by the said award, the appellants invoked jurisdiction of the High Court by filing Special Civil Application No.9893 of 1996 under Articles 226 and 227 of the Constitution. The learned Single Judge has dismissed the petition vide order dated 21.3.1997 giving rise to instant appeal.

9. Mr. H.S. Munshaw, learned advocate for the appellants, contended that the impugned judgment recorded by the learned Single Judge in Special Civil Application No. 9893 of 1996 confirming the award of the Industrial Tribunal is ex-facie illegal, unjust, arbitrary and contrary to the facts and evidence on record as well as number of reported decisions of the Supreme Court as well as of this Court. It was pointed out that the respondent was appointed as a daily wager on temporary basis without following due procedure of recruitment and if he is confirmed and regularized then it would amount to back door entry which is contrary to several judgments of the Supreme Court and of this Court. It was emphasized by him that there was no sanctioned post and the respondent was paid all wages from the contingency fund of the project cost and, therefore, the award should have been set aside by the learned Single Judge. It was claimed that when the respondent was appointed initially as a daily wager he had already completed 37 years and, therefore, as per recruitment rules he is not entitled to regularization in service because he was age barred. He, therefore, urged that as the award was passed contrary to the statutory provisions of the Gujarat Panchayats Act, 1963 ('the Act' for short) and the pronouncements of the Supreme Court as well as of this Court, it ought to have been set aside by the learned Single Judge in the petition filed under Articles 226 and 227 of the Constitution. He, therefore, prayed that the impugned judgment rendered by the learned Single Judge confirming the said award deserves to be quashed and set aside since the impugned award is contrary to law and settled principles of labour legislation.

10. In support of the aforesaid contentions, he relied upon the following decisions:

1) State of U.P. and others v. Ajay Kumar, (1997) 4 SCC 88.

2) State of Haryana and others v. Piara Singh and others, (1992) 4 SCC 118.

3) Narsi Bacha Thacker v. State of Gujarat and others, 1998 (1) GLH 1022.

4) Dilavarsinh Khodubha v. State of Gujarat and others, 1995 (1) GLR 110.

5) Unreported decision dated 9.4.2003 rendered by a Division Bench of this Court in the case of State of Gujarat v. Deenanji Gidhaji Thakore in LPA No. 810 of 2003.

6) Unreported decision dated 23.6.2000 rendered by a learned Single Judge of this Court in the case of F.B. Parmar v. State of Gujarat, in Special Civil Application No.2195 of 1986.

7) Unreported decision dated 10.1.2001 rendered by a Division Bench of this Court in the case of F.B. Parmar v. State of Gujarat, in LPA No.3 of 2001 confirming judgment delivered by a learned Single Judge of this Court in SCA No.2195 of 1986.

He also relied upon the statutory provisions of the Gujarat Panchayats Act and relevant Rules framed thereunder.

11. Mr. J.D. Ajmera, learned advocate for the respondent, raised a preliminary objection about the maintainability of the appeal filed under Clause 15 of the Letters Patent as according to him, appeal filed under Clause 15 of the Letters Patent is not maintainable against the judgment rendered by the learned Single Judge in a petition filed under Article 227 of the Constitution. According to him, though before the learned Single Judge the petition was filed under Articles 226 and 227 of the Constitution, in fact, the petition was filed only under Article 227 of the Constitution since the relief claimed in the petition was to quash and set aside the award of the Industrial Tribunal and, therefore, the appeal is not maintainable. It was pleaded by the learned advocate that the award passed by the Tribunal is in accordance with law and the Tribunal has rightly considered the past service of 21 years put by the respondent workman and then passed the award. It was pointed out that while passing the award the Tribunal has not given backwages upto 31.12.1994 and the respondent is given benefit of regular pay only with

effect from 1.1.1996 and as no illegality is committed by the Tribunal in passing the award, the appeal should be dismissed. It was also claimed by the learned advocate that before the learned Single Judge the petition was filed under Article 227 of the Constitution wherein the scope of interference by the High Court was very limited and confined only to correct the jurisdictional error since it was a review of the decision making process and not the decision itself and therefore also the appeal should be dismissed. According to the learned counsel, in a petition filed under Article 227 of the Constitution, the High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. But the learned Single Judge has rightly appreciated the facts recorded by the Tribunal and has very rightly dismissed the petition which does not warrant any interference in appeal filed under clause 15 of the Letters Patent. He, therefore, urged that the appeal being devoid of any merit deserves to be dismissed and accordingly the same may be dismissed.

11. We have considered the submissions advanced at the bar by the learned advocate of the respective parties and the documents forming part of the petition. We have also considered the impugned judgment and award passed by the Tribunal, judgment delivered by the learned Single Judge, statutory provisions contained in the Act and the decisions cited at the bar.

12. Since Mr. Ajmera, learned advocate for the respondent has raised a preliminary objection about the maintainability of appeal filed under Clause 15 of the Letters Patent against the order of the learned Single Judge passed in a petition filed under Article 227 of the Constitution, let us examine the scope of appeal filed under clause 15 of the Letters Patent against the order passed by the learned Single Judge of this Court.

13. According to Mr. Ajmera, the appellants have mentioned in the cause title of the petition that the petition is filed under Articles 226 and 227 of the Constitution, but in fact the petition is filed under Article 227 only as the appellants have challenged the award passed by the Tribunal and, therefore, the appeal is not maintainable. According to him, merely by mentioning Article 226 of the Constitution in the cause title it cannot be said that the petition is filed under Article 226 of the Constitution whereas according to Mr. Munshaw, the learned advocate for the appellants, if the appellants have in substance filed a petition under

Articles 226 and 227 of the Constitution challenging the awards of the Tribunal, the appeal under clause 15 of the Letters Patent filed against the order passed by the learned Single Judge in the petition filed under Articles 226 and 227 of the Constitution is maintainable.

14. In Dilavarsinh's case (supra), the Full Bench of this Court was called upon to answer the question referred by the Division Bench whether a writ petition challenging the legality of an order passed by the Urban Land Tribunal under Section 33 of the Urban Land (Ceiling & Regulation) Act, 1976 is in substance a writ petition filed under Article 227 or only under Article 227 of the Constitution. The Full Bench of this Court, after considering the judgment of the Supreme Court in the case of Umaji Keshao Meshram and others v. Smt. Radhikabai and another, AIR 1986 SC 1272, held that petition filed under Article 226 for a writ of certiorari or a writ in the nature of certiorari would lie against an order of the Urban Land Tribunal passed under Section 33 of the Urban Land (Ceiling & Regulation) Act, 1976, and order made in such petition by the single Judge is subject to appeal under Clause 15 of the Letters Patent.

15. In the case of Kanhaiyalal Agrawal and others v. Factory Manager, Gwalior Sugar Company Limited, (2001) 9 SCC 609, question of maintainability of an appeal filed under clause 15 of the Letters Patent against an order made in a writ petition filed under Articles 226 and 227 of the Constitution challenging the order passed by the Industrial Tribunal arose before the Supreme Court. While answering the said question, the Supreme Court in para 6 of the judgment noticed that so far as the law on the matter is concerned, as to whether an appeal would lie against an order made in writ petition before the High Court challenging an order of the Labour Court, the Supreme Court in its earlier decision in Lokmat Newspapers (P) Ltd. v. Shankarprasad, (1999) 6 SCC 275 has already stated that if a Single Judge exercises jurisdiction under Article 226, Letters Patent Appeal would be maintainable, but if the jurisdiction is exercised under Article 227 it will not be maintainable with a rider that if the Single Judge of the High Court in considering the petition under Article 226 or Article 227 does not state under which provision he has decided the matter and where the facts justify filing of petition both under Article 226 and Article 227 and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal. The Supreme Court held as aforesaid in view of the decisions of the Supreme Court in Umaji Keshao

Meshram's case (supra), Ratnagiri District Central Cooperative Bank Limited v. Dinkar Kashinath Watve, 1993 Supp (1) SCC 9 and Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha, 1993 Supp (1) SCC 11.

16. Applying the principles laid down by the Full Bench of this Court and the Supreme Court in the aforementioned cases to the facts of the present case, it can be seen that the appellants have filed the petition in substance under Article 226 of the Constitution against the award made by the Tribunal. The appellants have challenged the award of the Tribunal by which direction is issued to make the respondent permanent with effect from 1.12.1978 and also to treat the period from 1.12.1978 to 31.12.1994 as notional and pay arrears with effect from 1.1.1995. Since the learned Single Judge has upheld the said award, it can be said that while upholding the said award passed by the Tribunal the learned Single Judge has exercised the powers under Article 226 of the Constitution. Further more, in the instant case also the learned Single Judge while dismissing the petition filed under Articles 226 and 227 of the Constitution by the appellants does not state under which provision he has decided the matter. Therefore, in our considered opinion, when the facts justified filing of petition under Article 226 also and when the petition so filed is dismissed by the Single Judge on merits, it will have to be considered in its proper perspective in an appeal. Therefore, in our view, the appeal filed under clause 15 of the Letters Patent is maintainable.

17. Having held that the appeal filed under clause 15 of the Letters Patent is maintainable, now the next question which falls for our consideration is whether the learned Single of this Court has rightly exercised the jurisdiction vested in him under Article 226 of the Constitution while upholding the award passed by the Tribunal and whether the award passed by the Tribunal is in accordance with law, within jurisdiction and in consonance with the settled principles enunciated by the Supreme Court in catena of decisions. It cannot be gainsaid that the respondent was initially appointed as a temporary adhoc daily wager on daily remuneration of Rs.7/- with effect from 20.11.1975. The respondent was required to work as a clerk on the construction projects and works undertaken by the Taluka Panchayat and he was to be paid out of 2% contingency funds of the project cost. The said projects were sanctioned and finalised either by the District Panchayat or the State Government. The respondent was required to work as and when the work

was available. The respondent was continued as a clerk from time to time as one or other project was on the hand of the Taluka Panchayat, and contingency funds were available and the projects and grants were sanctioned either by the State Government or the Taluka Panchayat. The respondent was born on November 22, 1938 and, therefore, he had already crossed the age of 37 when he was appointed as a temporary adhoc daily wager on 20.11.1975. Therefore as per the provisions of the Act and rules he was not qualified to get appointment as a clerk. His entry was a back-door entry. For the purpose of recruitment to the staff of the Panchayat provisions relating to service are made under Section 227 of the Act and the expenditure is to be incurred from the Panchayat fund in view of Section 228 of the Act. Notwithstanding the above tale-telling facts, the Tribunal has given direction to the appellants to make the respondent permanent with effect from 1.12.1978.

18. In State of U.P. and others v. Ajay Kumar (supra), the Supreme Court held that the High Court's order to regularise such an employee as and when vacancy arises and to continue him till then is illegal. It is further held therein that there must exist a post and either administrative instructions or statutory rules must be in operation to appoint a person to the post and daily-wage appointment will obviously be in relation to contingency establishment in which there cannot exist any post and it continues so long as the work exists and, therefore, the Division Bench of the High Court was clearly in error in directing the appellants to regularise the service of the respondent, who was working as Nursing Orderly on daily wages, to the post as and when the vacancy arises and to continue him until then.

19. In the case of State of Haryana v. Haryana Veternaty and A.H.T.S. Assocn. and others, AIR 2000 SC 3020, a question arose before the Supreme Court. In the said case the Supreme Court has ruled that the service rendered by adhoc appointee appointed de hors recruitment rules cannot be held to be regular service and cannot be tagged on to service rendered by him after regular appointment.

20. Again in the case of Gujarat Agricultural University v. Rathod Labhu Bechar and others, 2001 (1) SLR 519, a question of making daily-rated employees permanent arose before the Supreme Court. In the said case the appellant was an educational institution fully aided by the State Government and was engaged in the educational activities in agriculture and allied sciences

and humanity and was also prosecuting research in agriculture and other allied science. It performed its duties and functions under the statutory provisions and in doing so it engaged daily rated labourers for various activities. According to the appellant of that case these labourers were being paid their wages as per the minimum wages fixed by the State Government from time to time under the Minimum Wages Act and were engaged due to exigencies of work, without considering relevant factors about their educational qualification, age limit and other relevant requirements for the purpose of regular appointment under the Recruitment Rules. The facts of said case disclose that there were different agricultural research centres at different places with different projects and these daily rated workers were unskilled, semi-skilled, skilled and field labourers of different categories and as the University was a grant-in-aid institution fully funded by the State Government it required proper permission/sanction of the State Government for appointment of its employees. Further, all the posts were sanctioned by the State Government and thereafter they were filled by the University as per the Recruitment Rules. The said case pertained to daily wage workers who were plumbers, carpenters, sweepers, pump operators, helpers, masons, etc. According to the appellant of that case, no posts were sanctioned for them and hence they were working on daily rate basis. Thus as per the appellant of said case, appointments were on irregular basis and not in accordance with the recruitment rules.

In the said case the respondents who were daily rated employees raised an industrial dispute before the Industrial Tribunal, Rajkot. The Industrial Tribunal directed the University to regularise the services of all such daily rated labourers who had completed 10 years of service (with minium of 240 days) as on 1.1.1993 with pay and all allowances along with other benefits of the permanent class IV employees. The University filed writ petition before the High Court challenging the said award. Learned Single Judge partly allowed the writ petition and set aside the award with a direction to the University to make the payment to the workmen at the minimum of the pay scale and also to frame a scheme for the regularisation of such daily rated labourers. The appellant - University filed Letters Patent Appeal No.1047 of 1999 against the order of the learned Single Judge and the Letters Patent Appeal came to be dismissed. Thereupon the appellant filed Special Leave Petition (C) No. 1490 of 1999.

In the said case the Tribunal had also issued direction to the appellant University to regularise the services of the daily rated workmen employed by the University on irregular basis and not in accordance with any recruitment rules. The Supreme Court held that the Court should exercise restraint where facts are such where extent of creation of posts creates financial disability.

21. A similar question arose before the learned Single Judge of this Court in F.B. Parmar's case (supra), wherein the petitioner who was appointed initially as a work-charged Clerk (Scarcity work) on purely temporary and ad hoc basis on 1.11.1974 filed a writ petition for issuance of writ of mandamus or any other writ, or order, directing the respondents, their officers, agents, etc. to appoint the petitioner on regular basis as a Clerk with consequential benefits. The learned Single Judge, after considering the relevant provisions of the Act as well as rules, dismissed the petition. The said order was challenged before a Division Bench of this Court by filing Letters Patent Appeal No.3 of 2001. The Division Bench summarily dismissed the appeal filed by the employee.

22. Therefore, in view of the catena of decisions referred to as above, it cannot be gainsaid that the order of the Tribunal directing the appellants to make the respondent workman permanent with effect from 1.12.1978 and to treat the period from 1.12.1978 upto 31.12.1994 as notional and to pay to the respondent arrears from 1.1.1995 onwards is without jurisdiction and authority and thus the Tribunal has exceeded its jurisdiction and direction is issued against the settled canons established by the Supreme Court as well as this Court on labour jurisprudence. The direction of the Tribunal to the appellants is to create a post for the respondent and ignore statutory provision relating to recruitment of staff. Further, the purpose for which the respondent was employed is ignored altogether and direction is given to accommodate the respondent on permanent basis though there is no set up. Therefore, direction to regularise the service of the respondent could not have been issued by the Tribunal. By granting the said relief, the Tribunal has brushed aside settled principles of law enunciated by the Supreme Court in catena of decisions. Therefore it deserves to be quashed and set aside. In the same way, the learned Single Judge while upholding the said award has not properly exercised jurisdiction vested in him under Article 226 of the Constitution. Therefore the said order also deserves to

be quashed and set aside by accepting the petition filed by the appellants.

23. For the foregoing reasons, the appeal succeeds and accordingly it is allowed. The order dated March 21, 1997 rendered by the learned Single Judge in Special Civil Application No.9893 of 1996 is quashed and set aside and the petition is allowed and thereby the award dated July 1, 1996 rendered by the Industrial Tribunal, Rajkot in Reference (ITR) No. 67 of 1991 is quashed and set aside. There shall be no order as to costs throughout.

24. As the appeal is allowed, Civil Application No. 3685 of 1997 which is filed for interim relief now does not survive. Hence it is disposed of. Rule is discharged. No order as to costs.

(J.N. Bhatt, Actg.C.J.)

(A. M. Kapadia, J.)

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